Supreme Court, U.S.
FILED

JUL 18 2002

OFFICE OF THE CLERK

NO. 01-1746

IN THE
Supreme Court of the United States

BUSH & BURCHETT, INC. AND JOE BURCHETT,

Petitioners,

v.

FRED RUSSELL, JR. AND REBECCA RUSSELL,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

RESPONDENTS' BRIEF IN OPPOSITION

LORI SIMPSON DAVIS
(Counsel of Record)
5127 NOYES AVENUE, S.E.
CHARLESTON, WV 25364
(304) 926-6500

Counsel for Respondents

July 18, 2002

QUESTION PRESENTED

This case concerns whether respondents Fred and Rebecca Russell may sue petitioners — a construction company and its principal — under the West Virginia workers' compensation statute for severe injuries suffered by Mr. Russell while working on a construction project commissioned by the State of West Virginia to build a bridge over the Tug Fork river running between West Virginia and Kentucky. The West Virginia Supreme Court of Appeals answered that question "yes," purely as a matter of state law, and reversed the trial court's dismissal on the ground that Kentucky law applied to the Russells' claims. The question presented is:

Should this Court grant review where:

(1) the ruling below did not finally decide the case, but rather remanded it for further proceedings, which may or may not result in a trial on the merits and liability for petitioners;

(2) the federal questions presented in the petition were neither properly raised nor decided by the courts below; and

(3) petitioners agreed in their construction contract with the State of West Virginia that all workers employed on the project would be protected by the West Virginia Workers' Compensation Act.

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RESPONDENTS' BRIEF IN OPPOSITION

The petition is an amalgam of omissions and factual distortions. When those omissions are revealed, and the true facts are presented, it will be apparent that the petition should be denied.

I. This Court Lacks Jurisdiction.

Although the petition was filed within 90 days of the denial of rehearing below, this Court does not have jurisdiction under 28 U.S.C. § 1257, which provides jurisdiction over "[f]inal judgments or decrees" rendered by state courts of last resort.

The trial court dismissed the Russells' complaint on the grounds urged by petitioners — that the Russells had no cause of action under West Virginia law. The Supreme Court of Appeals vacated the dismissal and "remanded for further proceedings" that may or may not result in a final verdict on the merits. *See* Pet. App. 22. Thus, the decision below is "avowedly interlocutory," *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997), and is not a final judgment for purposes of 28 U.S.C. § 1257. "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Id.* at 81 (quoting *Mkt. St. Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 551 (1945)). The final judgment rule minimizes this Court's interference with state-court litigation and promotes the orderly conduct of litigation. When "[r]esolution of the state-law claims could effectively moot the federal questions," *id.* at 82, which is true here, a writ of certiorari is unnecessary and therefore beyond the scope of jurisdiction authorized by § 1257.

There are narrow exceptions to the strict finality rule, none of which is applicable here. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held that it may treat an interlocutory state-court decision as final in four limited circumstances. The first three are when the state court's decision on the "federal issue is conclusive or the outcome of further proceedings preordained"; when the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings"; and when later review of the federal issue will be foreclosed regardless of the outcome of the case. *Id.* at 479-81. None of these exceptions applies because the "decision" on the Full Faith and Credit and Due Process claims was not conclusive (indeed, there was no decision below on the federal questions) and the outcome of the case is certainly not preordained; if the Russells lose on the merits on remand, a decision on the federal issues would be avoided; and petitioners would be free to raise the federal issues on review from a judgment in the Russells' favor (assuming, quite generously, that petitioners have preserved those issues as a matter of state law).

The fourth *Cox* exception has two parts, both of which must be met for this Court to have jurisdiction. That exception applies where (1) the federal issue has been finally decided with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, *and* (2) reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action and a refusal immediately to review the state court decision might seriously erode federal policy. 420 U.S. at 482-83. Neither prong is met here. As explained below (at 3-4), the federal issues were *never* decided below, because petitioners

did not raise them until their petition for rehearing *after* the Supreme Court of Appeals ruled against them; and, although reversal on the grounds urged by petitioners would preclude further litigation against them on the Russells' West Virginia cause of action, it cannot plausibly be argued that allowing a single trial to go forward against petitioners "would seriously erode federal policy." At a minimum, the "erosion of federal policy" factor applies only where the state-court ruling will have some effect beyond the individual case, *see Florida v. Thomas*, 532 U.S. 774, 780 (2001), and that cannot be the case here because the ruling below did not even address the federal issues.

In sum, this Court does not have jurisdiction to review this case and the petition must be denied.

II. The Federal Issues Presented In The Petition Have Been Waived And The Petition Should Be Denied For That Reason As Well.

Petitioners assert that the Russells' claims are barred by the Full Faith and Credit and Due Process Clauses of the federal constitution. As shown in Part III below, that contention is incorrect and provides no basis for review. But there is a more fundamental reason why the petition should be denied: As noted above, petitioners did not raise the federal issues until their petition for rehearing after the court below had ruled against them on the purely state-law grounds that they had raised. *Compare* Brief of Appellees Bush & Burchett, Inc., in *Russell, et al. v. Bush & Burchett, Inc., et al.*, Appeal No. 28398 (Nov. 17, 2000) (raising purely state-law issues), *with* Petition for Rehearing of Appellees Bush & Burchett, Inc., at 7-11, in *Russell, et al. v. Bush & Burchett, Inc., et al.*, Appeals No. 28398 and 28720 (Dec. 28, 2001) (raising federal issues for the

first time). Not surprisingly, the Supreme Court of Appeals denied petitioners' request for rehearing without comment, and, as a result, this Court is not presented with a decision below that addresses the federal issues.

It is a long-established principle that this Court will not address arguments neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2001); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *Duignan v. United States*, 274 U.S. 195, 200 (1927). The Court should apply that principle and decline to review the issues presented here.[1]

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[1]Much like this Court, the Supreme Court of Appeals of West Virginia applies a "general rule" "that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Taylor v. Cabell Huntington Hospital, Inc.*, 538 S.E.2d 719, 725 n.13 (W. Va. 2000) (quoting *Barney v. Auvil*, 466 S.E.2d 801, 809 (1995)). That rule was violated in spades here, since the federal issues were not raised until the appellate *rehearing* stage. Under West Virginia law, rehearing is for the purpose of bringing to the attention of the court "points of fact or law" that "the Court has overlooked or misapprehended[,]" *see* W. Va. Rules App. Proc. 24(a), not for raising entirely new issues.

III. The Full Faith And Credit And Due Process Arguments Presented In The Petition Are Premised On False Assertions Regarding The Facts Of This Case.

The petition is based entirely on the following assertion: because *all* of Fred Russell's contacts were with Kentucky and *all* of the facts concerning the accident arose in Kentucky, allowing the Russells an award under the West Virginia workers' compensation statute would violate principles of Full Faith and Credit and Due Process, where Mr. Russell had previously obtained a Kentucky workers' compensation recovery. Even assuming its factual premises, petitioners' argument is, to put it charitably, suspect — after all, the principal argument advanced by petitioners is that a decision of this Court, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), should be *overruled. See* Pet. 7-12. In any event, petitioners' factual premises are false. In fact, the Russells' case has a significant nexus with West Virginia. Consider, among other things, the following:

- First, and of dispositive importance, the West Virginia state bidding process in which petitioner Bush & Burchett participated, and the construction contract between the West Virginia Department of Transportation's Division of Highways and petitioner Bush & Burchett, specifically required that all "project workers would be covered by the West Virginia Workers' Compensation Fund and Act." Pet. App. 115-16. Based on this undisputed fact, the Supreme Court of Appeals held (Pet. App. 12):

> that there is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers

> on a West Virginia state-funded construction project. B&B was unquestionably aware of and contractually agreed to comply with this policy. No countervailing factors weigh heavily against applying West Virginia law in this circumstance. Accordingly, the pertinent factors in a comity analysis weigh conclusively on behalf of the Russells being authorized to bring a deliberate intention action against B&B under West Virginia law.

- The bridge project required work in both Kentucky and West Virginia, and Mr. Russell worked "the majority of [his] work hours ... in the State of West Virginia." Russell Affidavit, ¶ 8.

- Prior to his injury, Mr. Russell worked for approximately 3 and ½ years for Bush & Burchett on another project in *West Virginia*.

These facts were uncontroverted in the trial court, but none of them appears in the petition. However, they dispose of the question presented on the merits, even assuming, quite generously, that the question presented is legally colorable. The petition should be denied for this reason as well.

IV. Even If This Court Had Jurisdiction, And Even If The Petition Presented A Properly Preserved Federal Question Based On An Accurate Rendition Of The Facts, There Would Be No Basis To Grant Review.

Even if the Court were to assume that it has jurisdiction (which it does not), and were to look past petitioners' waiver of

the questions presented (which it should not) and petitioners' distortion of the factual record (which undermines any claim of error by the court below), review would still be unwarranted. As to the Full Faith and Credit issue, as noted earlier, petitioners concede that controlling law is contrary to their position and seek certiorari to overrule one of this Court's precedents. Overriding the principle of *stare decisis* is rare in any circumstance; at the very least, petitioners must come forward with compelling evidence that the controlling authority — *Thomas* — has caused problems of judicial interpretation, administrative enforcement, or fairness to litigants or workers' compensation insurers. The petition cites *no* such problems; indeed, it does not cite a single case from any jurisdiction even suggesting that *Thomas* is a cause for concern, nor does it cite any secondary authority (such as a workers' compensation treatise or law review article) or empirical analysis indicating that the result that petitioners seek is needed.[2]

Petitioners' purported due process claim — that West Virginia has exceeded its "legislative jurisdiction" because of West Virginia's alleged lack of contacts with the "regulated subject" (*i.e.*, Bush & Burchett), *see* Pet. 17 — is even more strained than their Full Faith and Credit claim. For the reasons explained in Part III above, this argument is fatally flawed because West Virginia has very significant contacts with this case, which concerns a bridge project over a river that runs

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[2]The petition implies that the decision below would allow Mr. Russell a double recovery, but that is not so. If the Russells were to recover under West Virginia law, the Kentucky workers' compensation insurer would presumably assert its subrogation rights against Mr. Russell to the extent of its Kentucky workers' compensation payout. Certainly, nothing in the decision below, or in *Thomas*, would bar such subrogation.

between West Virginia and Kentucky. Even assuming away the real facts, and focusing only on the portions of the record that petitioners have shared with the Court, *see* Pet. 17-18, the case would not be worthy of review. Petitioners do not claim that there is a serious problem with inappropriate assertions of extraterritorial legislative jurisdiction around the country or even by the State of West Virginia, nor do they cite any cases that even hint at such a problem. Thus, this Court's review of the decision below would turn on the highly idiosyncratic facts pertaining to the West Virginia Division of Highway's bridge construction project on the Tug Fork river and would have no effect beyond the Russells' claim for recovery under West Virginia's workers' compensation law. Thus, even on its own terms, the petition provides no basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LORI SIMPSON DAVIS
(Counsel of Record)
5127 NOYES AVENUE, S.E.
CHARLESTON, WV 25364
(304) 926-6500

Counsel for Respondents

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